STATE OF WISCONSIN
IN SUPREME COURT

Case No. 99-2587-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

STANLEY SAMUEL,

Defendant-Appellant.

Appeal From The Judgment Entered In The Circuit Court For Winnebago County, The Honorable Thomas S. Williams, Circuit Judge, Presiding, And From The Order Entered in the Circuit Court For Winnebago County, The Honorable Barbara Hart Key, Circuit Judge, Presiding

BRIEF OF DEFENDANT-APPELLANT

ROBERT R. HENAK
State Bar No. 1016803
HENAK LAW OFFICE, S.C.
1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Counsel for Defendant-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules and Statutes

Other Authorities

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 99-2587-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY SAMUEL,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

STATEMENT OF THE CASE

On June 11, 1996, the state filed a criminal complaint charging Stanley Samuel with interference with child custody in violation of Wis. Stat. §948.31(2) (R1).[1] On March 21, 1997, after Samuel was arrested in Missouri, the state filed an amended criminal complainant charging Samuel with interference with child custody, Wis. Stat. §948.31(2), and abduction, Wis. Stat. §948.30(1)(a), both as a repeater, Wis. Stat. §939.62(1) (R4). The counts concerned an incident on January 29, 1996, in which 15-year old Tisha L. left the home of her mother, either because she ran away from home (the state's view) or because she was thrown out (Tisha's view), and then left Wisconsin

[1] Throughout this brief, references to documents in the record are identified by the docket sheet number as "R___"; the following ":___" reference denotes the page number of the document. When the document is included in the Appendix to the state's brief, it is identified by Appendix page number as "App. __."

with Samuel. The state filed a second amended complaint on March 24, 1997, adding a charge of second degree sexual assault of a child, Wis. Stat. §948.02(2). The third count concerned the allegation that Samuel and Tisha had sex at some point between September 10 and 20, 1995, at a time when Tisha was 15 years old. (R5).

On March 8, 1997, Samuel and Tisha were stopped at a roadblock in Phelps County, Missouri. Samuel waived extradition and was returned to Wisconsin for an initial appearance on March 21, 1997. Tisha was returned to Wisconsin where, on March 10, 1997, she gave birth to a daughter.

On March 12, 1997, after Tisha declined to provide any information against Samuel, government agents placed her newborn daughter in a foster home pending Tisha's "cooperation." When Tisha subsequently provided the agents with a statement against Samuel, her daughter was returned to her on March 14, 1997. (R100:16, 48).

At the preliminary examination on April 2, 1997, Tisha testified that, contrary to her statement to the agents, she and Samuel did not have sex prior to leaving Wisconsin (R94:5-7, 10-11). The Court nonetheless bound Samuel over for trial based upon Tisha's prior, unsworn statements to the officers (*id.*:106-08). On April 16, 1997, Samuel was arraigned on an information charging him with the same three offenses (R8; R95).

After various pretrial hearings, the case proceeded to a jury trial on December 1, 1997, Hon. Thomas S. Williams, presiding (R102). On December 4, 1997, the jury returned verdicts convicting Samuel on all three counts of the information (R60; R105:101).

On January 16, 1998, the circuit court, Hon. Thomas S. Williams, presiding, sentenced Samuel to 38 years imprisonment and

a consecutive term of 16 years probation in lieu of a stayed prison term (R107:68-70), and entered judgment (R68; R69). The court entered amended judgments of conviction on February 25, 1998 (R74; R75).[2]

Samuel timely filed his Notice of Intent to Pursue Post-conviction Relief (R70), and, on August 4, 1999, he filed his post-conviction motion (R84; R85). The parties briefed that motion (R86; R87). Following arguments on September 30, 1999, the circuit court, Hon. Barbara Hart-Key, presiding, denied the motion and entered an order reflecting that denial (R108; R90; App. 123-25).

Mr. Samuel timely filed his notice of appeal (R91) and, on December 27, 2000, the Court of Appeals reversed (App. 101-19).

TRIAL EVIDENCE

Tisha L. testified at trial that she met Stanley Samuel through her mother, Cindy Jones, during the summer of 1995 (R103:118). Jones and Tisha's father, Peter L., were divorced, and Tisha was living with her mother at the time in Oshkosh, Wisconsin (*id.*:117-18). Tisha, who turned 15 in September, 1995, and Samuel developed a friendship over the following months (*id.* at 118-19).

In late November, 1995, Tisha and Samuel reported Jones to Samuel's parole officer and to Social Services for the unsanitary condition of her home and for additional reasons excluded from evidence at trial.[3] (R103:17, 123, 130; R104:128-29, 187-88; R105:13-

---

[2] Samuel subsequently was sentenced to an additional 14 years incarceration on four counts of uttering a forged instrument in Dane County Case No. 97-CF-951. Samuel does not challenge that conviction and sentence.

[3] The primary focus of the reports was not the condition of the home, but the claim that Jones' upstairs neighbor had been molesting Tisha's younger sister, Laura (R107:45; *see* R103:130; R104:187-88). This claim, however, was excluded from evidence at trial (R103:17; R104:128-29, 187-88; R105:13-14).

14). The relationship between Jones and Tisha then deteriorated, with Jones seeking and obtaining a no-contact order from Samuel's parole officer (*id.*:134-36). After Samuel moved to South Dakota in December, 1995, the relationship continued to deteriorate until Jones gave Tisha two weeks notice in mid-January, 1996, that she would have to leave (R104:187).

On January 29, 1996, Tisha voluntarily left with Samuel because she wanted to leave and because her mother had kicked her out (R103:141; R104:190-91, 221).

Tisha testified that she and Samuel were just friends prior to leaving, and that she left with him because she had nowhere else to stay (R103:143, 154-55; R104:221-22). Their relationship did not develop into anything more than friendship until March or April of 1996 when they were outside of Wisconsin. The two did not have sex in Wisconsin or before they had left Winnebago County on January 29, 1996. (R103:139-40; R104:196).

At trial, the state once again relied primarily upon Tisha's prior, unsworn statements to the police to the effect that she had sex with Samuel in September, 1995, when she had just turned 15 (R103:155, 165-68, 171-73; R104:19, 22, 26-27, 83-84, 87, 89-99; R56:Exh. 7). The state also presented testimony of Tisha's parents to the effect that they did not consent to her leaving with Samuel (R102:120-21, 186), and Jones' claim that she did not throw her daughter out of the house (*id.*:121).

The state also called as witnesses two girls who said they were friends of Tisha's and that Tisha had told them that she had sex with Samuel (R103:101-04, 201, 203). The state also called a boy who claimed that Tisha told him the same thing while he was attempting to

make out with her after a party (*id.*:88-89).[4] Tisha's 10-year old sister, Laura, also testified that she had seen Samuel at Jones' house when Jones was not there, that she had seen Samuel once kiss Tisha on the cheek, that she had seen Tisha and Samuel on Tisha's bed one time, and that she had seen Tisha and Samuel sitting on a "bed" in the back of Samuel's pickup (R102:156-61).

One neighbor, Judy Paulick, confirmed the unsanitary condition of Jones' house, describing it as a "disgusting pigsty," but also claimed to have once seen Samuel kiss Tisha goodby (R103:12-13). Another neighbor, and friend of Jones, Rachel Davis, claimed that she saw Samuel's car at Jones' home almost every night after Jones left on her paper route (*id.*:19-20).

Samuel's probation officer, Darryl Meenk, however, testified that Samuel was on DIS electronic monitoring until sometime in October, 1995, requiring him to be at home in the evenings (R103:34).

A jail inmate, Mark O'Kray, also testified. Soon after getting into a fight with Samuel in jail in April, 1997, O'Kray contacted the police and claimed that Samuel had admitted to him that he and Tisha had sex in her bedroom the night before they left. (R103:38-41).

Tisha admitted making the statements to Sagmeister and Schraufnagel, but testified that they were false and made only because she was told that she would not get her baby back unless she "cooperated." (R103:154-73; R104:206-11). She also testified that she never told her friends that she was having sex with Samuel (R104:212-16).

---

[4] Contrary to the claims of these witnesses, Tisha's best friend at the time, Molly Maxwell, testified that Tisha never talked much about her boyfriends and that Tisha never said she was having sex with Samuel (R103:191-92).

SUMMARY OF ARGUMENT

The state asks this Court to place its imprimatur on the practice of police coercion of innocent parties to extract incriminating statements deemed necessary to support prosecution of another. The state concedes that admission of such evidence against an uncoerced third party, such as Mr. Samuel in this case, violates due process. According to the state, however, such a defendant has no constitutional objection to admission of the results of these coercive methods so long as the physical or psychological abuse of the witness is not deemed "extreme." In other words, the state claims the police should be free to use the same coercive methods and stratagems against innocent witnesses as have long been recognized as contrary to common decency and due process when applied to a criminal suspect.

The state's argument has no basis in law or common sense. The use of statements extracted involuntarily by coercive police practices are no more reliable, no less abusive, and no less offensive to common decency merely because they are forced from an innocent third party rather than from a criminal suspect.

As for the appropriate procedures for enforcing the defendant's due process right, the state is correct that the defense must show something more than mere speculation to support a hearing on this issue. It is wrong, however, in suggesting that the defendant must bear the burden of proof at such a hearing. Rather, as with other instances of police conduct which may have the effect of rendering evidence unreliable, the defendant need only make the initial showing of government coercion, after which the state must bear the burden of showing that the statement was nonetheless voluntary.

Regardless what legal standard is applied in this case, however,

and regardless who must bear the burden of proof, the undisputed evidence from the suppression hearing demonstrates that the statements attributed to Tisha L. were involuntary and constitutionally inadmissible in any event. However the state may ultimately seek to define its subjective standard that the government agents use "extreme coercion or torture" against the individual, taking a young woman's newborn child pending her decision to "cooperate" in the prosecution of the child's father plainly fits any rational construction of those terms.

Given the critical effect of the coerced statements in nullifying Tisha L.'s exculpatory testimony, moreover, the state cannot meet its burden of proving the admission of such statements to be harmless beyond a reasonable doubt. The appropriate remedy, therefore, is reversal of Samuel's convictions and remand for a new trial without admission of Tisha's coerced statements.

ARGUMENT

I.

ADMISSION OF TISHA's PRIOR STATEMENTS TO STATE AGENTS VIOLATED SAMUEL's RIGHTS TO DUE PROCESS

The central issue here concerns when a criminal defendant's rights to due process mandates exclusion of an involuntary, out-of-court statement extracted from a third party by police coercion. The state concedes that the defendant has a due process right to exclusion of such evidence, but only when the state agents used something it labels "extreme coercion or torture." State's Brief at 12. The state does not explain what is meant by "extreme coercion or torture" other than that it is something more than the coercion necessary to support exclusion of a defendant's own statement under the due process clause

on grounds of involuntariness.

The Court of Appeals rejected the state's proposed limitation, following instead the common sense principle that "'methods offensive when used against an accused do not magically become any less so when exerted against a witness . . ..'" (App. 110, *quoting United States v. Gonzales*, 164 F.3d 1285, 1289 n.1 (10th Cir. 1999)). The Court of Appeals was correct and the state is wrong.

A. Background

Prior to trial, Mr. Samuel moved for suppression of Tisha's statements to Officer Sagmeister and Mr. Schraufnagel on the grounds they were coerced. The court heard evidence on the claim on September 18 1998. (R100:8-54).

Tisha gave birth to her daughter on March 10, 1997. On March 12, 1997, a secure custody hearing was held to determine placement for Tisha and her baby. Tisha was placed in her father's custody, while the baby was placed in the custody of the Department of Social Services, with placement to be determined at an intake conference. (R100:44-45).

An intake conference was held immediately following the custody hearing. Present were Corporation Counsel Grant Thomas; County intake worker Kim Threw; the social worker on Tisha's delinquency matters, Chris Stanaszak; David Keck, Tisha's attorney; and a physical and sexual abuse investigator from the Department of Social Services, Rodney Schraufnagel. Tisha's father, Peter L., arrived later, as did Officer Steven Sagmeister and Peter's girlfriend, Catherine Stelzner. (*Id.*:10, 45). The supposed purpose of the intake conference was to determine where the baby would be placed (*id.*:44-45).

Tisha testified that, at the time of the intake conference, she was

tired and under the influence of drugs, having only recently given birth. (R100:10, 12). She also testified that, despite the limited purpose of the intake conference, a number of questions were asked at that time regarding her sex life with Stanley Samuel and where they had been during their trip (*id.*:10-11, 19-20). When Tisha declined to answer the questions as irrelevant to placement of her baby, the questioners were not satisfied and told her several times that she must "cooperate" in order to get her baby back. They told her that she would have to give Officer Sagmeister a statement prior to the March 14 hearing on the baby's custody in order to get her back. (*Id.*:10-14, 20-23, 46-47).

Tisha felt quite intimidated and believed that she had to "cooperate" to get her baby back (R100:14-15). Accordingly, she met with Sagmeister and Schraufnagel on March 13, 1997, and gave them the statement (*id.*:15-16). Beforehand, her father told her he had spoken with Schraufnagel and that what they wanted was an account of a sexual relationship with Samuel before they left Wisconsin and a statement that she wanted to come home (*id.*:27-28). After she gave the inculpatory statement, her baby was returned to her on March 14, 1997 (*id.*:16, 48).

Immediately after the hearing on March 14, Schraufnagel and Sagmeister had Tisha give a second statement because the tape recording of the first one did not come out (R100:21). On March 21, 1997, Schraufnagel and Sagmeister had Tisha provide a written statement. Although her daughter had been returned to her and the officers made no express threats to her at that time, Tisha was still intimidated by the statements and results of the intake conference and felt she still needed to "cooperate" to keep her baby (*id.*:17-18).

Peter L. testified that he was surprised by the questions at the

intake conference, which he thought would be limited to placement for the baby (R100:34). The questioners became angry for Tisha's "not cooperating" in the investigation and stated that, in the absence of "cooperation," they could not trust her with the baby (*id.*:36-37). Peter admitted that Schraufnagel had relayed to him the areas of "cooperation" they were interested in addressing (*id.*:38).

Cathy Stelzner testified that she asked at the intake conference for the rationale for taking Tisha's baby. She was told that Tisha was not giving them the information that they wanted, but that they would consider giving the baby back if they saw some "cooperation." Stelzner viewed their position as "blackmail" and felt they were using the baby as a pawn. (R100:49-51).

Tisha's attorney was not with her when she gave the inculpatory statements (R100:48), and her father was only with her for a short time during the statements and then left (R100:39, 41, 42).

The state chose to present no witnesses at the hearing. (R100:54).

The circuit court expressed some concern about authority for suppressing coerced statements made by a witness rather than by the defendant and requested briefs on that issue, as well as on the issue of coercion (R100:6-8, 55). The parties filed briefs, but neither found authority directly addressing the standing issue (R40; R43:2). Defense counsel argued that the statements were coerced and that the same standards for suppression should apply to witness statements to avoid the incentive to coerce statements from "uncooperative" witnesses, statements which would be inherently untrustworthy. (R40).

The state did not respond to the coercion argument, choosing to rely solely on its claim that Samuel lacked standing to challenge

admission of Tisha's coerced statements (*see* R43:2).

By written decision dated November 14, 1997, the circuit court denied the motion to suppress Tisha's statements (R46:1-2; App. 121-22). The court did not decide whether Tisha's prior statements in fact were coerced. Instead, it held that the statements could not be suppressed even if they were coerced:

> I conclude that, if otherwise admissible, Tisha's statements cannot be excluded soley [sic] on the ground that they were coerced, and deny defendant's motion to suppress them.

(R46:2; App. 122).

By post-conviction motion, Samuel again raised this issue. He there noted both that the United States Supreme Court had held that statements are coerced and involuntary if extracted by threats to take away a person's child and that federal courts consistently have held that a defendant's due process rights are violated by admission at trial of a coerced witness statement. (R84:7-13).

Following legal arguments on September 30, 1999 (R108:8-24), the circuit court, Hon. Barbara Hart-Key, presiding, again denied the motion. In essence, the court held that (1) the federal cases upholding the defendant's due process right to suppression of coerced witness statements were distinguishable because the witnesses in those cases were potential codefendants rather than victims, (2) Tisha's statements were not involuntary or coerced because she had brought the removal of her baby upon herself by running away from home, (3) that the officers did not expressly tell Tisha what to say, and (4) there was some level of corroboration for the statements (R108:26-7; App. 124-25).

The Court of Appeals reversed, holding that due process

mandates exclusion of involuntary witness statements extracted by government coercion just as it requires exclusion of statements coerced from the defendant (App. 102-11). Because the circuit court made no findings after the pre-trial evidentiary hearing on this issue, however, the Court remanded the case for a new voluntariness hearing (App. 111-12).

B. The State Waived Its Argument for a New, Higher Standard for Voluntariness of a Statement

The state here concedes that due process mandates suppression of coerced witness statements, but claims that a higher level of coercion is required to trigger suppression of a witness' statement than for that of a defendant. However, the state failed to raise its claim regarding the appropriate standard to apply in assessing the voluntariness of witness statements until oral argument in the Court of Appeals (App. 106-07). In its brief below, the state did not challenge application of the traditional standard for voluntariness adopted by this and any number of other courts. Instead, the state "assume[d], for purposes of this appeal, that the test for voluntariness of a witness's statement is the same test used to determine the voluntariness of a defendant's inculpatory statements." State's Court of Appeals Brief at 15. That is exactly the standard applied here by the Court of Appeals (App. 110-11).

Before this Court, the state has abandoned its claim below that Tisha's statements were somehow voluntary, arguing only that its new, higher standard for voluntariness should be adopted in place of the traditional standard for voluntariness of statements. Yet, it waived that claim by failing to proffer it until the oral argument below. *E.g.*, *City*

of Milwaukee v. Christopher, 45 Wis.2d 188, 172 N.W.2d 695, 696 (1969) (party waives claim by failing to raise it until oral argument); *A.O. Smith v. Allstate Insurance Co.*, 222 Wis.2d 475, 588 N.W.2d 285, 292-93 (Ct. App. 1998).

C. Due Process Bars Admission of Involuntary Witness Statements Resulting From Police Coercion

Even if the state had not waived its claim, the fact remains that the Court of Appeals' holding objected to by the state is fully consistent both with existing law and sound public policy. The state's proposed limitation on due process, on the other hand, is not.

The state concedes that a criminal defendant has a due process right to suppression of coerced witness statements, State's Brief at 13, 22, and the law on this issue is well-established. As the Alaska Supreme Court recently recognized, "both our case law and that of other jurisdictions uniformly recognize a defendant's ability to assert a due process violation based on the coercion of witnesses whose statements are used against the defendant at trial." *Raphael v. State*, 994 P.2d 1004, 1008 (Alaska 2000). *See, e.g.*, *United States v. Gonzales*, 164 F.3d 1285, 1289 (10th Cir. 1999); *Clanton v. Cooper*, 129 F.3d 1147, 1157-58 (10th Cir. 1997) ("[B]ecause the evidence is unreliable and its use offends the Constitution, a person may challenge the government's use against him or her of a coerced confession given by another person"); *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994) ("Confessions wrung out of their makers may be less reliable than voluntary confessions, so that using one person's coerced confession at another's trial violates his rights under the due process clause"), *cert. denied,* 513 U.S. 1085 (1995); *United States v. Merkt*,

764 F.2d 266, 274 (5th Cir. 1985) ("A defendant may assert her own fifth amendment right to a fair trial as a valid objection to the introduction of statements extracted from a non-defendant by coercion or other inquisitional tactics" (footnote and citations omitted)); *United States v. Cunningham v. DeRobertis*, 719 F.2d 892, 896 (7th Cir. 1983) (violation of another's Fifth Amendment rights may violate one's own right to a fair trial); *Bradford v. Johnson*, 476 F.2d 66 (6th Cir. 1973), *aff'g* 354 F.Supp. 1331 (E.D. Mich. 1972). *See also LaFrance v. Bohlinger*, 499 F.2d 29, 34 (1st Cir. 1974):

> It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case . . .. Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness.

This right to suppression of coerced witness statements is based in the due process right to a fair trial. As such, it is wholly independent of the defendant's right to be free from compelled self-incrimination or from use of his or her own coerced statements at trial. *E.g.*, *Gonzales*, 164 F.3d at 1289.[5]

It is likewise well-established that a defendant's constitutional rights are implicated where the state (or even the judge) employs coercive or intimidating language or tactics that substantially interfere with a defense witness' decision whether to testify. *Webb v. Texas*, 409 U.S. 95 (1972) (due process violated where judge "gratuitously singled out" defense witness for a lengthy and unnecessarily strong admonition

---

[5] *Compare State v. Cartagena*, 40 Wis.2d 213, 161 N.W.2d 392, 395-96 (1968) (defendant's own privilege against self-incrimination does not bar admission of witness' involuntary statement; Court did not address whether admission would violate defendant's own due process rights).

on dangers of perjury, resulting in witness' refusal to testify); *United States v. Vavages*, 151 F.3d 1185 (9th Cir. 1998) (due process violated where prosecutor substantially interfered with decision of defendant's wife to testify); *see State v. Koller*, 87 Wis.2d 253, 274 N.W.2d 651, 664-65 (1979). Just as it violates a defendant's due process rights to use coercion to deny him the testimony of a defense witness, so too must it violate due process to use such coercion to create evidence against him and, in the process, to nullify a defense witness' evidence.

The state claims, however, that this due process right to suppression should be limited to cases in which the state agents subjected the witness to "extreme coercion or torture." State's Brief at 14. The state is wrong.

Initially, it should be noted that the state's suggested standard makes no sense in light of the structure and intent of the established due process test for voluntariness. Although coercive police activity is a necessary predicate to finding that a statement is involuntary under the Due Process Clause, *Colorado v. Connelly*, 479 U.S. 157, 167 (1986), coercive activity alone does not, in and of itself, establish involuntariness. Rather, the "[d]etermination of whether a statement is voluntary requires a balancing of the personal characteristics of the defendant against the coercive or improper police pressures." *State v. Pheil,* 152 Wis.2d 523, 449 N.W.2d 858, 863 (Ct. App. 1989).

Under this traditional balancing approach, therefore, a lower level of coercion may result in an involuntary statement from a weak-willed person, although it would not effect one more self-assured. *See Blackburn v. Alabama*, 361 U.S. 199, 206 (1960). Under the state's proffered standard, however, the first person's statement would be admissible, even though it was just as involuntary, just as unreliable,

and just as improperly extracted as one resulting from physical torture.

The established standard for voluntariness applied by the Court of Appeals here, on the other hand, is fully consistent with established due process standards. "Substantive due process . . . serves the goal of preventing 'government power from being "used for purposes of oppression,"' [and] serves as a vehicle to limit various aspects of potentially oppressive government action." *Howard v. Grinage*, 82 F.3d 1343, 1349 (6th Cir. 1996) (citation omitted).

As the state concedes, due process is violated when the admission of evidence violates "fundamental conceptions of justice." State's Brief at 14 (citations omitted). It is well-established that admission of statements coerced by the state violates those "fundamental conceptions of justice." *E.g.*, *Spano v. New York*, 360 U.S. 315, 320 (1959). "[M]ethods offensive when used against an accused do not magically become any less so when exerted against a witness." *Gonzales*, 164 F.3d at 1289 n.1; *Raphael*, 994 P.2d at 1008.

The state's proposed distinction between "extreme" coercion and torture on the one hand and "run of the mill" coercion and torture on the other, moreover, is constitutionally meaningless. As the Supreme Court has recognized, less medieval forms of coercion may be just as effective in extracting an involuntary statement as full-fledged torture, depending on the target of the police abuse:

> [C]oercion can be mental as well as physical, and ...the blood of the accused is not the only hallmark of an unconstitutional inquisition. A number of cases have demonstrated, if demonstrations were needed, that the efficiency of the rack and the thumbscrew can be matched, given the proper subject, by more sophisticated modes of "persuasion."

Blackburn, 361 U.S. at 206. *See also Raphael*, 994 P.2d at 1008.

Not one decision cited by the state or found by the defense holds that coerced witness statements which would be involuntary under traditional standards are admissible as substantive evidence merely because they resulted from a "non-extreme" level of state coercion. Rather, the cases cited by the state either ordered suppression where there was in fact torture, *see Bradford*, *supra*, did not even involve admission of a coerced witness statement, *United States v. Chiavola*, 744 F.2d 1271 (7th Cir. 1984); *People v. Bell*, 548 N.E.2d 397 (Ill. App. 1989), or involved a witness who voluntarily testified at trial consistent with an allegedly coerced prior statement, *Merkt*, *supra*; *United States v. Fredericks*, 586 F.2d 470 (5th Cir. 1978); *United States ex rel. Portelli v. LaVallee*, 469 F.2d 1239 (2d Cir. 1972). None of these cases established the limitation sought by the state as none was even confronted with the issue.

Nor does any decision cited by the state or found by the defense suggest that there is a relevant distinction between coerced witness statements and those of the defendant when assessing admission, as here, of the statement as *substantive* evidence. As most, a few decisions cited by the state upheld use of allegedly coerced statements purely for impeachment. *See Wilcox v. State*, 301 S.E.2d 251 (Ga. 1983), *habeas relief denied*, *Wilcox v. Ford*, 813 F.2d 1140 (11th Cir. 1987); *Pinder v. State*, 520 A.2d 1101 (Md. Ct. Spec. App. 1987); *State v. Montgomery*, 229 S.E.2d 904 (N.C. 1976); *State v. Vargas*, 420 A.2d 809 (R.I. 1980), *habeas relief granted*, *Vargas v. Brown*, 512 F.Supp. 271 (D. R.I. 1981).

These decisions, however, either preceded or overlooked the Supreme Court's determination that coerced statements are

inadmissible for *any* purpose, including impeachment. *Mincey v. Arizona*, 437 U.S. 385 (1978). Even otherwise voluntary statements taken in violation of the prophylactic *Miranda* rules can be used for impeachment only if sufficiently "trustworth[y]." *Harris v. New York*, 401 U.S. 222, 224 (1971). The refusal to permit government use of involuntary statements for any purpose, however, stems not just from their inherent unreliability, but from abhorrence of the official lawlessness which produces them. *Vargas v. Brown*, 512 F.Supp. at 275.

Also, while the Supreme Court has permitted use of illegally obtained evidence for impeachment under some circumstances, it has squarely held that "'evidence that has been illegally obtained . . . is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt.'" *James v. Illinois*, 493 U.S. 307, 313 (1990) (citation omitted). Of course, Tisha's statements were admitted not solely for impeachment, but as substantive evidence against Samuel. *See Vogel v. State*, 96 Wis.2d 372, 291 N.W.2d 838 (1980).

The only case cited by the state which superficially supports its desired conclusion is *Johnson v. Washington*, 119 F.3d 513 (7th Cir.), *cert. denied,* 522 U.S. 973 (1997). The court there upheld admission of a witness' prior coerced statements as substantive evidence, noting that "Johnson has not identified any law that entitles him to relief." *Id.* at 521. In so holding, however, the court overlooked the ample and consistent authority holding to the contrary, including its own prior decision in *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994), as well as the legal analysis applied in those cases.

In contrast, those cases which have seriously considered the issue hold, like the Court of Appeals here (App. 110), that the same

voluntariness standards apply, regardless whether the statement is coerced from the defendant or from a third party. *E.g.*, *Gonzales*, 164 F.3d at 1289 n.1; *Raphael*, 994 P.2d at 1008.

Lacking any legal authority for its proposed limitations, the state turns to policy arguments, attempting to find support for some relevant distinction between admission of evidence coerced from the defendant and that coerced from a third party. State's Brief at 15-22. The state is correct that there are some differences. *Johnson*, 119 F.3d at 519 n.2 (values underlying exclusion of defendant's coerced statement "not necessarily implicated when dealing with the statement of a witness"); *Vargas*, 420 A.2d at 814 (same). However, none in fact makes a difference.

While the state is correct that a broad range of policy factors have been cited in support of the privilege against self-incrimination, State's Brief at 16, *quoting*, *Murphy v. Waterfront Com'n of New York Harbor*, 378 U.S. 52, 55 (1964), the Supreme Court has observed that the policies cited in *Murphy* "point to one overriding thought" -- that the government must respect "the dignity and integrity of its citizens." *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). This same "overriding thought" likewise underscores the due process right asserted here, although the privilege against self-incrimination also incorporates a testimonial privilege having no relevance to admission of out-of-court statements and places somewhat greater emphasis on requiring the government to bear the burden of proof, *see id.*, than does the due process rationale.

The Supreme Court has explained exclusion of coerced statements on the grounds that involuntary statements are inherently untrustworthy and their use violates our fundamental sense of decency.

Jackson v. Denno, 378 U.S. 368, 385-86 (1964). What the Supreme Court observed about coerced confessions applies equally to statements coerced from those not even suspected of crimes:

> The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Spano v. New York, 360 U.S. 315, 320 (1959).

That Court also has noted that the exclusion of coerced statements enforces the judicial policy of deterring coercive police tactics and techniques. *E.g.*, *Rogers v. Richmond*, 365 U.S. 534 (1961); *see Pheil*, 449 N.W.2d at 863 ("The fourteenth amendment prohibits involuntary statements because of their inherent unreliability and the judicial system's unwillingness to tolerate illegal police behavior"). As the state puts it, State's Brief at 16-17, deterrence is necessary to protect the individual from the lazy prosecutor or agent who would choose to build his or her case through coerced statements, if permitted to do so, rather than thoroughly investigate other sources. Again, this policy of deterrence applies fully when, as here, the victim of police coercion is not a suspect but an innocent third party.

Indeed all of these reasons for suppression of statements coerced from a suspect apply equally when it is a witness whose statements are coerced. *See, e.g.*, *Dimmick v. State*, 473 P.2d 616, 619-20 (Alaska 1970):

> Statements which are the product of coercion may be

> unreliable and untrustworthy, and thus should be excluded as evidence against one not coerced into making them. But more important, coerced statements are condemned because of the "strongly felt attitude of our society that important human values are sacrificed where an agency of the government, in the course of securing a conviction, wrings a confession out of an accused against his will." Those human values may be as much involved and in need of protection when an involuntary statement is used to convict one not coerced into making it as well as when used against the one from whom the statement was obtained.

See also People v. Underwood, 389 P.2d 937, 943 (Cal. 1964) (an involuntary "statement by a witness is no more trustworthy than one by a defendant, its admission in evidence to aid in conviction would be offensive to the community's sense of fair play and decency, and its exclusion, like the exclusion of involuntary statements of a defendant, would serve to discourage the use of improper pressures during the questioning of persons in regard to crime").

While admission of coerced statements is unacceptable to due process regardless of its truth or untruth, *e.g.*, *LaFrance*, 499 F.2d at 33, the state is wrong to suggest reliability is irrelevant to due process. After all, due process mandates exclusion of out-of-court identifications, for instance, specifically because they are unreliable. *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977) ("reliability is the linchpin" of admissibility).

The state's analogy to accomplice testimony also misses the point for another reason. State's Brief at 20. While the state is correct that such testimony must be viewed with caution, that witness provides his or her incriminating testimony which in court and *under oath*. The threat of perjury charges and, if relevant to the individual, religious

condemnation, provide some counterbalance to the contaminating effects of the accomplice's deal with the state, providing at least some level of reliability. There is no such counterbalance, however, when the state seeks admission of unsworn, extra-judicial statements extracted by coercion.

The availability of the oath and the court's protection of the witness from further police coercion also helps explain the different result when the state seeks admission, not of a coerced statement, as in this case, but the live, incriminating testimony of a witness who previously was subjected to police coercion. So long as the witness' incriminating testimony is not itself coerced, its admission does not violate due process. *People v. Badgett*, 895 P.2d 877, 884 (Cal. 1995) (defendant has standing to challenge witness testimony on "continuing coercion" grounds). *Compare Bradford v. Johnson*, 354 F. Supp. 1331, 1336 (E.D. Mich. 1972) (admission of testimony violates due process where witness subject to continued coercion while testifying); *Raphael, supra* (same), *with Merkt*, 764 F.2d at 274 (no due process violation where incriminating testimony not coerced); *Fredericks, supra* (same), *Portelli, supra* (same).

When the evidence admitted at trial is itself coerced, however, its admission violates due process, regardless whether it is witness testimony or an unsworn, extra-judicial statement. *E.g.*, *People v. Jenkins*, 997 P.2d 1044, 1090 (Cal. 2000), *cert. denied*, 121 S.Ct. 1104 (2001); *Badgett*, 895 P.2d at 884.

The state's reliance on *Badgett* thus is misplaced. State's Brief at 17-19. That Court neither held nor even suggested that due process allowed admission of coerced, extra-judicial witness statements. *See* 895 P.2d at 884 ("[W]hen the evidence produced at trial is subject to

coercion ... defendant's due process rights [are] implicated and the exclusionary rule ... [is] applied"). Rather, the language quoted at length by the state merely explains why the witness' voluntary trial testimony may not be suppressed on "fruit of the poisonous tree" grounds. A defendant can challenge admission of the fruits of a violation of his own rights. However, since a defendant's rights are not violated by the coerced, out-of-court extraction of evidence from a witness, he has no standing to challenge the fruits of that violation. It is only when the coerced evidence itself is admitted at trial that violation of his own due process rights occurs and can be challenged. 895 P.2d at 884-87.

The Court also should note that at least one factor mitigates even more strongly in favor of exclusion when a witness rather than a suspect is the victim of police coercion. However inherently unreliable the defendant's own coerced statements might be, statements coerced from third parties are even less reliable.

The Supreme Court has noted that false statements may arise whenever an individual is placed in a dilemma where a false statement is the more promising of two alternatives between which she must choose. *See In re Gault*, 387 U.S. 1, 44-45 (1967), quoting 3 J. Wigmore, Evidence §822 (3d ed. 1940). Yet, while a criminal suspect will always have a strong interest in not caving in to police coercion and falsely incriminating himself, the witness will have no such inherent counterbalance to the coercive pressures of the police. Unlike the suspect, the relative balance for the witness subject to police coercion for a statement against someone else more squarely falls on the side of telling the police what they want, regardless whether it is true.

Sanctioning police coercion of witnesses as requested by the state thus would diminish rather than enhance the truth seeking function of the trial while at the same time encouraging police coercion and misconduct. It is precisely when the state has little other evidence supporting a theory of guilt that resort to such tactics is most tempting.

Indeed, the state has admitted as much, arguing both in the circuit court (R87:4-5) and in its Petition for Review at 16-17 that resort to police coercion of witnesses sometimes is necessary, in its view, to ease its burden in certain criminal trials. According to the state, allowing police coercion of witnesses is necessary to avoid "unfairly complicat[ing] the prosecution of many domestic violence and child sexual assault cases." *Id.* at 16. The state is concerned that exclusion of coerced witness statements might leave it with insufficient evidence to support a conviction in some cases. *Id.*

The state's argument turns the presumption of innocence and due process on their heads. It assumes that anyone who is arrested must be guilty and that the end of establishing guilt in court thus necessarily justifies the means of using coerced and inherently unreliable witness statements to achieve that goal, regardless of the injury it causes the coerced witnesses or the fundamental fairness of the trial.

The state's suggestion that it is somehow good public policy to encourage police coercion of statements from witnesses is wholly antithetical to a society which is supposed to be based on the law and due process rather than the mere convenience of prosecuting authorities. "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard" for the constitution. *Mincey*, 437 U.S. at 393. Regardless of the ends sought, the fact

remains that "coercing witnesses . . . is a genuine constitutional wrong." *Buckley v. Fitzsimmons*, 20 F.3d 789, 795 (7th Cir. 1994). It accordingly should not be endorsed by this Court.

And finally, coercion of the type the state seeks to pursue is at best counterproductive in the long run:

> Use of unjustified force by those charged with serving the public tears harder at the fabric of society than almost any other form of abuse of official powers. In this case, evidence circumstantial to the defendant's guilt or innocence revealed that the police may have used such reprehensible tactics to gain the cooperation of certain suspects. Such behavior undermines the effectiveness of law enforcement efforts over time.

United States v. Chiavola, 744 F.2d 1271, 1274 (7th Cir. 1984).

Having found no support in either the relevant authorities or public policy, the state finally asserts that, absent "extreme coercion or torture," voluntariness should be left to the jury to sort out. State's Brief at 20-22. Again, the state is wrong. *E.g.*, *Gonzales*, 164 F.3d at 1289, *LaFrance*, 499 F.2d at 35-36 (if genuine issue re voluntariness, due process requires hearing before admission of witness' prior statement for impeachment); *Vargas v. Brown*, *supra* (same); *see Jackson v. Denno*, 378 U.S. 368 (1964). Once again, the only cases remotely supporting the state's argument either involved statements used solely for impeachment, *e.g.*, *Pindar*, *supra*; *Montgomery*, *supra*; *State v. Vargas*, *supra*, or overlooked the jurisdiction's prior authority to the contrary, *Johnson*, 119 F.3d at 521 (where defendant "has not identified any law that entitles him to relief," court overlooks its own prior decision and legal analysis in *Buckley*, *supra*).

The state's suggestion adds nothing to its prior arguments. Coerced witness statements are kept from the jury because they are

unreliable, because police coercion is contrary to fundamental fairness and decency, and because exclusion is necessary to deter such misconduct and insure the integrity of the courts. Adopting the state's argument would permit it to benefit from its own wrongdoing -- allowing it to taint the jury's assessment with unreliable evidence created through police coercion. *See, e.g.*, *Fredericks*, 586 F.2d at 481; *cf. Jackson v. Denno*, *supra*.

The state's proposed limitation on exclusion of coerced witness statements would both open the courts to unreliable evidence and encourage coercive police tactics contrary to fundamental fairness and common decency. It has failed to provide any rational justification for such a dramatic change in the law. This Court accordingly should reject it.

D. Tisha's Statements Were Coerced and Involuntary Under Any Legal Standard

Regardless what standard this Court ultimately applies, due process requires exclusion of Tisha's statements to the police.

The voluntariness of a statement turns on whether the person "made an independent and informed choice of his own free will, possessing the capability to do so, his will not being over-borne by the pressures and circumstances swirling around him." *United States v. Castaneda-Castaneda*, 729 F.2d 1360, 1362 (7th Cir. 1984) (citation omitted). Voluntariness depends on the totality of the circumstances and must be evaluated on a case-by-case basis. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973).

Although coercive police activity is a necessary predicate to the finding that a statement is involuntary under the Due Process Clause,

Colorado v. Connelly, 479 U.S. 157, 167 (1986), coercive activity alone does not, in and of itself, establish involuntariness. Rather, the "[d]etermination of whether a statement is voluntary requires a balancing of the personal characteristics of the defendant against the coercive or improper police pressures." *State v. Pheil,* 152 Wis.2d 523, 449 N.W.2d 858, 863 (Ct. App. 1989). It is important under this analysis to determine that the individual "was not the victim of a conspicuously unequal confrontation in which the pressures brought to bear on him by representatives of the state exceed[ed] the [individual's] ability to resist." *State v. Clappes*, 136 Wis.2d 222, 401 N.W.2d 759, 765 (1987) (citation omitted).

There is no doubt that Tisha's statements were coerced.[6] She

---

[6] Contrary to the state's bald assertions, every witness who testified at the suppression hearing supported the fact that the return of Tisha's baby depended on her "cooperation" with the police in their investigation of Mr. Samuel.

Tisha, for instance, testified that the state agents at the intake conference specifically told her that she would not get her baby back unless she "cooperated" with the police. It was obvious to her that what they required her to tell them was not the truth but what they wanted to hear about Mr. Samuel. (R100:12-14).

Tisha's father testified that he was surprised at the questions asked, given the supposed purpose of the intake conference (R100:34). He further testified that, although there were no *express* threats, the agents were very angry for Tisha's failure to "cooperate" in the investigation of Samuel and, as a result, the baby was taken from her (*id.*:36-37). He was told that Tisha's "cooperation" was needed to prosecute Samuel and relayed the officers' message to Tisha about what information they wanted (*id.*:41, 43).

Although Attorney Keck claimed to have perceived no threats, he acknowledged as well that Tisha's baby was placed in a foster home pending her "cooperation" with the police, which he understood to mean a statement supporting a criminal prosecution of Samuel (R100:46-48).

Finally, Cathy Stelzner testified that the agents told her at the intake conference that they would consider giving the baby back to Tisha at the next hearing if they saw some "cooperation," a position she viewed as "blackmail." (R100:50-51).

Contrary to the central premise of the state's argument, therefore, it was quite obvious to everyone at the intake conference that the return of Tisha's baby turned on her providing a statement to the police which would support prosecution

(continued...)

was told numerous times that she would have to "cooperate" with the police or her newborn baby would be taken from her. When she did not "cooperate" by providing a statement against Samuel, the officers followed through on their threat and took her baby. Tisha was told that the return of her baby turned on her "cooperation" in the criminal investigation. She also was told that her "cooperation" was necessary to prosecute Samuel. (*E.g.*, R100:38-9, 41, 43).

From the context of these statements to her it was quite obvious to all involved what the supposed "cooperation" entailed. Samuel was under arrest and it was the police, not the social workers, with whom Tisha was to "cooperate" in order to get her baby back. At the intake conference, Grant Thomas and Kim Threw became angry with Tisha, said that "she was failing to cooperate in the investigation" (R100:36), and directed her to speak with the police whom, she was also told, needed her cooperation in order to prosecute Samuel *(e.g., id.*:43). Schraufnagel, through Tisha's father, expressly told her that she had to give an account of a sexual relationship with Samuel before they left Wisconsin (*id.*:27-28).

It does not take a rocket scientist to understand that the "cooperation" at issue under these circumstances did not include statements exculpating Samuel, but rather required just the opposite. It was eminently reasonable to construe the agents' statements about "cooperation," as Tisha did, as requiring statements supporting a prosecution of Samuel. (R100:31, 43).

The statements thus plainly were coerced, no matter what level

---

[6](...continued)
of Samuel. This was a clear threat, whether express or implied, and was backed by the fact that the baby indeed was kept from Tisha pending her "cooperation."

of coercion this court ultimately may require. *E.g.*, *Lynumn v. Illinois*, 372 U.S. 528 (1963) (oral confession, made by defendant only after police told her that state aid would be cut off and her children taken from her, was coerced in violation of due process). The Ninth Circuit Court of Appeals explained, in language equally applicable here, the coercive nature of such threats to take a child in the absence of "cooperation:"

> We think it clear that the purpose and objective of the interrogation was to cause Tingle to fear that, if she failed to cooperate, she would not see her young child for a long time. We think it equally clear that such would be the conclusion which Tingle could reasonably be expected to draw from the agent's use of this technique. *The relationship between parent and child embodies a primordial and fundamental value of our society. When law enforcement officers deliberately prey upon the maternal instinct and inculcate fear in a mother that she will not see her child in order to elicit "cooperation," they exert the "improper influence" proscribed by Malloy [v. Hogan, 378 U.S. 1 (1964).]*

United States v. Tingle, 658 F.2d 1332, 1336 (9th Cir. 1981) (Emphasis added).

Any parent would readily understand that the removal of a newborn child pending one's "cooperation" in a criminal prosecution easily constitutes either "extreme coercion" or "torture." Indeed, the taking of one's child may be viewed as more coercive than even one's own incarceration. *Raphael*, 994 P.2d at 1010.

As in *Lynumn* and *Tingle*, the state agents deliberately preyed on Tisha's maternal instinct and inculcated fear in her that her newborn child would not be returned to her until and unless she provided "cooperation" by incriminating Samuel. Indeed, the coercive effect of

the agents' actions in this case were, if anything, more forceful than those in the cited authorities, because the officers here in fact did take Tisha's baby from her pending her "cooperation." The officers in *Lynumn* and *Tingle* merely threatened to do so. While the defendants in those cases may have believed the officers had the authority and would follow through on their threats, Tisha knew first hand that the officers here would do so because they already had taken her baby from her for her failure to "cooperate." *See also Raphael, supra* (incarceration of witness and taking of her children pending her testimony against defendant resulted in coerced testimony and reversal).

Contrary to the circuit court's suggestion (R100:26; App. 124), it is wholly irrelevant whether Tisha somehow deserved to have her child taken due to her decision to leave home and travel with Samuel. In both *Lynumn* and *Tingle*, the courts found that statements were coerced and involuntary despite the fact that the individuals at issue were believed to have committed criminal offenses. In each of those cases, moreover, the threatened loss of a child was based upon the individual's supposed commission of that offense. They both were told that, only by making the statement sought by the officers could they avoid losing their children. Of course, that is exactly the situation here.

Even if Tisha's conduct could have justified the taking of her child, the evidence is clear that it was not her actions with Samuel, but her refusal to tell the officers what they wanted to hear, which placed the child in a foster home. The key to releasing the child to her mother was Tisha's statements incriminating Samuel; nothing changed between March 12, when the agents took her child, and March 14, when they returned her, except that Tisha caved in and provided such

a statement.

The law also is clear that exclusion of coerced statements is not limited to cases in which the police acted in bad faith. Even when the coercion may be deemed justified, suppression of the involuntary statement is required as a matter of due process. For instance, while a probationer legally may be required to answer incriminating questions on pain of revocation and incarceration for failing to do so, his responses subsequently may not be used against him in court. *State v. Evans*, 77 Wis.2d 225, 252 N.W.2d 664 (1977); *State v. Thompson*, 142 Wis.2d 821, 419 N.W.2d 564, 566-68 (Ct. App. 1987)

In addition to the official coercion, the Court must consider whether Tisha's personal characteristics were sufficient to resist the overwhelming coercive effect of the taking of her child pending her "cooperation" against Samuel. *Clappes*, 401 N.W.2d at 765. Nothing suggests that she had such extraordinary willpower.

Tisha was only 16 years old at the time of her statements, was left alone to deal with the officers,[7] and had only recently given birth to her first child. It was that child, moreover, whom the state agents used as their lever to pry an inculpatory statement from her. In *Tingle*, *Lynumn*, and *Raphael*, it appears that both the victims of the official coercion and their children were much older.

When viewed together, the state tactics applied here were conducted "so as to 'control and coerce [Tisha's] mind,'" *Clappes*, 401 N.W.2d at 767, quoting *Phillips v. State*, 29 Wis.2d 521, 530, 139

---

[7] Contrary to the post-conviction court's finding (R108:26; App. 124), Tisha's attorney was not with her when she gave the inculpatory statements (R100:48), and her father was only with her for a short time during the statements and then left (R100:39, 41, 42). That finding thus was clearly erroneous.

N.W.2d 41 (1966), and that Tisha's resulting statements were not the product of a "free and unconstrained will, reflecting deliberateness of choice." *Id.* at 765 (citation omitted). Tisha was not at all inclined to make inculpatory statements to the state agents and declined to do so prior to being subjected to the coercive tactics employed here. *Cf. Haynes v. Washington*, 373 U.S. 503, 514 (1963). Instead, those statements were wrenched from her by the state's use of "overbearing inquisitorial techniques." *See Clappes*, 401 N.W.2d at 766 (citation omitted).

"The entire thrust of police interrogation [in this case] was to put [Tisha] in such an emotional state as to impair [her] capacity for rational judgment." *Miranda,* 384 U.S. at 465. In this, the state succeeded. The resulting statements therefore were involuntary.

Finally, it is simply irrelevant whether, as the post-conviction court found, certain peripheral aspects of the statements were corroborated by other witnesses (R108:27; App. 125). Even if the statements had been fully corroborated by independent evidence and demonstrated to be truthful, which they were not, the purported accuracy of a statement is irrelevant to whether it was voluntary or admissible. *E.g.*, *State v. Agnello*, 226 Wis.2d 164, 593 N.W.2d 427, 431 ¶13 (1999) ("It is well settled constitutional law that the truthfulness of a confession can play no role in determining whether the confession was voluntarily given." (citations omitted)).

This is not a case in which the state merely coerced a witness to attend the trial or to answer questions put to her. The state, like the defense, is entitled to subpoena witnesses and to require them to testify at trial. Rather, whether Tisha's baby would be returned to her turned not only on *whether* she made a statement, but on the *substance* of that

statement as well. The officers insisted on "cooperation" in the prosecution, not statements exculpating Samuel. When a witness can interpret coercive police action as an attempt to influence the *substance* of her statements, as the record indicates was the case here, the risk that the witness may not speak freely and truthfully is too great for due process to bear. *Raphael*, 994 P.2d at 1010.

II.

THE *VELEZ* STANDARD FOR ENTITLEMENT TO A PRETRIAL EVIDENTIARY HEARING IS APPROPRIATE

The state plainly is wrong in suggesting either that the Court of Appeals' decision would require voluntariness hearings in every case, State's Brief at 25-26, or that the evidence here somehow would be insufficient to require such a hearing, *id.* at 23-25. *See* Section I, D, *supra.* Still, it is correct that a clear standard for assessing future motions to suppress involuntary witness statements would be helpful.

The state also is correct that the standard announced in *State v. Velez*, 224 Wis.2d 1, 589 N.W.2d 9 (1999), appears to be appropriate. That standard properly accounts for the "inherent difficulties a defendant may have in developing the facts necessary to support a pretrial motion." 589 N.W.2d at 15. Noting that, prior to trial, "a defendant is often not in a position to have the necessary and proper facts before him on the ultimate question," *id.*, the Court there held that the defendant need not allege facts which, if true, would entitle him to relief. Rather, the defendant is entitled to an evidentiary hearing whenever "the motion, alleged facts, inferences fairly drawn from the

alleged facts, offers of proof, and defense counsel's legal theory" show a "reasonable possibility" of success following a hearing. *Id.* at 15, *quoting State v. Garner,* 207 Wis.2d 520, 533, 558 N.W.2d 916, (Ct. App.1996). Only "[w]here the record establishes no factual scenario or legal theory on which the defendant may prevail," or "where the defendant holds only hope but articulates no factually-based good faith belief that any impropriety will be exposed through an evidentiary hearing," can such a hearing be denied. *Id.* at 17.

Applying this standard, therefore, the circuit court will take into account the fact that most evidence regarding coercion of witnesses will be in the hands of the police so the defendant often will not be in a position to make specific factual allegations of coercion. Under those circumstances, the hearing still will proceed so long as the defendant's allegations show a "reasonable possibility" of coercion. *See id.* at 15, 17.

Once the defendant properly places voluntariness of the witness statement in issue, it is the government's burden at such a hearing to prove voluntariness by a preponderance of the evidence. *E.g.*, *LaFrance*, 499 F.2d at 36. "When the admissibility of proffered evidence is challenged, the burden is on the proponent of the evidence to show why it is admissible." *State v. Leighton*, 237 Wis.2d 709, 616 N.W.2d 126, 141 (Ct. App. 2000).[8] Just as with voluntariness of a defendant's statement, the state will be in the best position to present evidence regarding the police tactics used to extract statements from a

---

[8] *Cf. State v. Wolverton*, 193 Wis.2d 234, 533 N.W.2d 167, 178 (1995) (once defendant shows suggestiveness of identification procedures, burden on state to demonstrate identification nonetheless reliable to avoid suppression under due process).

witness.

III.

THE ERROR WAS NOT HARMLESS

The state cannot meet its burden of proving that the admission of Tisha's prior statements was harmless beyond a reasonable doubt. *State v. Dyess*, 124 Wis.2d 525, 370 N.W.2d 222, 231-32 (1985) (state must demonstrate harmlessness beyond reasonable doubt). Indeed, virtually the state's entire case consisted of the prior statements and its efforts to provide some minimal level of corroboration for peripheral aspects of those statements. Tisha's trial testimony directly contradicted those portions of the prior statements helpful to the state. Without the prior statements, in short, the state had no case.

While the state concedes that any error denied Samuel a fair trial on the sexual assault charge, it suggests that admission of Tisha's coerced statement had no effect on the remaining charges. Citing evidence which it believes could cause a jury to question Tisha's testimony, the state speculates that the jury might have discounted Tisha's testimony anyway. State's Brief at 30-31.

It is possible that the state's argument could carry some weight with a jury; given the evidence presented, a reasonable jury could have gone either way absent evidence of the coerced statements.[9] But it is not enough for the state to show that the jury *might* have reached the same result absent the improper evidence; rather, it must show beyond

---

[9] Of course, this assumes that the Court of Appeals was correct that the evidence was sufficient for conviction on the interference and abduction counts (App. 113-18). While Samuel submits that it was not, the Court denied him review on those claims.

a reasonable doubt that the jury still *would* have reached that result. *Dyess*, *supra*. That, the state has failed to do.

There can be no doubt that the coerced statement tainted the jury evaluation of *all* of Tisha's testimony. A reasonable jury easily could have credited Tisha's testimony regarding the deterioration of her relationship with her mother after she reported Jones to Social Services and that her mother ultimately threw her out. That testimony was not inherently incredible and was corroborated by independent evidence that Tisha did report her mother and that Jones' home was, in fact, a "disgusting pigsty" as she claimed (R102:117; R103:12-13, 34-35).

Admission of Tisha's coerced statements, however, forced the jury either to believe Tisha's testimony as a whole or not to believe it. The only relevant dispute on the abduction and interference claims was between Tisha's testimony that Jones threw her out and Jones' uncorroborated denials. Admission of the coerced statements, however, transformed the credibility dispute into one between Tisha on the one hand and Jones and the officers on the other, with the officers' testimony about the statements effectively bolstering Jones' claims by rebutting Tisha's.

The Court of Appeals was right (App. 112-14, 118). Under these circumstances, in which admission of the coerced statements acted unfairly to besmirch Tisha's credibility across the board, the error cannot be written off as harmless.

IV.

THE APPROPRIATE REMEDY IS REVERSAL OF THE CONVICTION AND A NEW TRIAL, NOT REMAND

The circuit court already has conducted a full evidentiary hearing in this matter and the state made a strategic decision not to present any evidence. The state was fully aware of the rule against piecemeal litigation, barring parties from raising once argument while holding another in reserve should the first prove unsuccessful. The state thus waived or abandoned any right to present additional evidence when it failed to follow well-established state procedure for presenting such evidence. *See State v. McDonald*, 50 Wis.2d 534, 184 N.W.2d 886, 888 (1971). "[T]he failure to follow well-known state practices results in a waiver." *Id.* Where, as here, moreover, the circumstances suggest a deliberate choice not to follow the applicable procedure, the failure "amounts to a waiver binding upon the [party] and this court." *Id.* (citation omitted).

The evidence accordingly is undisputed, with every witness who testified acknowledging that a statement by Tisha to the police supporting the prosecution of Samuel was the *quid pro quo* required for return of her child. The facts are evident in the record and establish Samuel's entitlement to relief on whatever standard the Court ultimately may adopt. Given the evidence from that hearing, a circuit court finding that Tisha's statements were voluntary would have been reversible error. *See* Section I, D, *supra*.

Voluntariness is an issue of constitutional fact reviewed *de novo* by this Court. *Miller v. Fenton*, 474 U.S. 104 (1985). Because the evidence is undisputed and fully supports Samuel's entitlement to

relief, there is no reason to remand to the trial court for yet another hearing on the matter. *E.g.*, *Chuck Wagon Catering, Inc. v. Raduege*, 88 Wis.2d 740, 277 N.W.2d 787, 791 (1979) (where evidence insufficient to support judgment even if circuit court had made findings of fact, reversal appropriate).

CONCLUSION

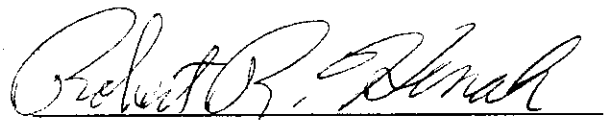
Because the trial court erred in admitting Tisha's prior coerced statements into evidence, and that error was not harmless, Samuel is entitled to reversal of his conviction on all three counts and a new trial.

Dated at Milwaukee, Wisconsin, July 10, 2001.

Respectfully submitted,

STANLEY SAMUEL, Defendant-Appellant

HENAK LAW OFFICE, S.C.



Robert R. Henak
State Bar No. 1016803

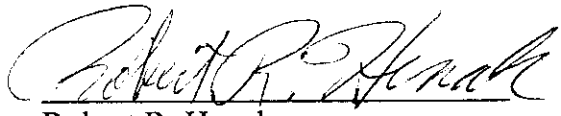
P.O. ADDRESS:

1223 North Prospect Avenue
Milwaukee, Wisconsin 53202
(414) 283-9300

Samuel S. Ct. Brief1.wpd

RULE 809.19(8)(d) CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Rule 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 10,599 words.



Robert R. Henak

Samuel S.Ct. Cert

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No. 99-2587-CR
(Winnebago County Case No. 97-CF-109)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

STANLEY SAMUEL,

Defendant-Appellant.

APPENDIX OF DEFENDANT-APPELLANT

F:\DATA\WP60\S-V\SAMUEL\APP\SS1700.BRZ

STATE OF WISCONSIN : CIRCUIT COURT : WINNEBAGO COUNTY

STATE OF WISCONSIN,

Plaintiff,

Case No. 97-CF-109
Hon. Barbara Hart-Key

v.

STANLEY A. SAMUEL,

Defendant.

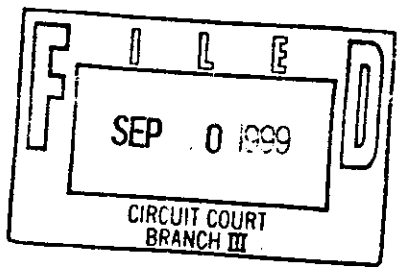
ORDER DENYING MOTION FOR POST-CONVICTION RELIEF

For the reasons stated on the record on September 30, 1999, Mr. Samuel's Motion for Post-Conviction Relief is DENIED.

SO ORDERED this 30 day of September, 1999.

BY THE COURT:

Barbara Hart-Key
Circuit Court Judge



STATE OF WISCONSIN CIRCUIT COURT BRANCH III WINNEBAGO COUNTY

STATE OF WISCONSIN,

Plaintiff,

-vs- Case No. 97 CF 109

STANLEY A. SAMUEL, POST-CONVICTION MOTIONS

Defendant.

* * *

TRANSCRIPT OF PROCEEDINGS

Thursday, September 30, 1999

* * *

Transcript of Proceedings of the Post-Conviction Motions had in the above-captioned case heard on Thursday, September 30, 1999 held in Circuit Court Branch III, the Honorable Barbara H. Key presiding.

* * *

CATHERINE J. CARVER
OFFICIAL COURT REPORTER
BRANCH 3
415 JACKSON STREET
OSHKOSH, WI 54903

this X on this statement, she said Y-- or not X in court. It is proper for the State to come back and show specifics that are consistent.

It is not, I submit, proper for an officer to come in and testify in my opinion her entire statement was consistent with what her other statement was. That is a statement of opinion. That is not a statement of fact.

With regard to sentencing, there is nothing that I found to suggest that the Court's violation of Gardner and Skaff, by denying the defense a fair opportunity to rebut the information that the Judge is relying on, can be deemed harmless because there is other evidence in the record from which the Judge might have reached the same conclusion.

You know, we all can make mistakes. A judge is not going to necessarily make the decision based on part of the evidence that he or she would make on a much broader type of evidence and that is set forth I think in United States ex rel. Welch which is set forth in the motion.

Concededly, it's an inaccurate statement at sentencing rather than considering statements which you don't have an opportunity to rebut. But the due process analysis I think is the same; that, if the Court relied on it, then there has to be a new sentencing. Thank you, Your Honor.

THE COURT: Well, first of all, on the

issues of Count 1 and 2, insufficiency of the evidence. This court is not convinced that consent or permission is somehow an element here. The testimony from this trial was, one, that the Defendant for lack of a better term-- to this court appears fairly simple. Took her with him and he left the state.

Now, to this court when an adult has a child in their physical custody or control and they leave the area with that child without the parents' consent or permission a taking has occurred.

I think there is a difference here between causing a child to leave, certainly. But that can be distinguishable enough for this court to not make any determinations as to any legislative intent. Again, causing one to leave doesn't necessarily have to fit this circumstance.

The Court found Mr. Jorgensen's arguments in the brief fairly persuasive that way in terms of giving other types of examples in which an adult could cause someone to leave. Again, to this court that act of taking the child and taking them into physical custody and control outside the area is the taking.

The Court would find that there is sufficient and credible evidence here in any reasonable view to support this verdict and both verdicts will be sustained and the

motions will be dismissed.

As to Count 3-- or excuse me. As to Argument No. 3, as to the coerced statements by Ms. Leyh or what's been alleged to be coerced and with regard to their admissibility, certainly there have been a number of cases that have been cited that are from the federal courts.

None of those are particularly enlightening given the fact that those did deal with co-defendants-- and in this case, in all honesty, the Court wouldn't be able to even find coercion. This is a totally different type of circumstance than say a witness comes in and she's a mother and the police say if you don't tell us what we want to hear, we're taking your child.

This is a case in which the mother was a minor on the run, who gave birth while on the run and was subsequently returned. It was her acts for which the child was initially taken into custody and certainly that is distinguishable from the types of cases that have been cited here today.

There, again, in all of the meetings with the police, her attorney was present, her father was present-- and again, it was her acts beforehand which led to originally there being an issue as to whether the child would remain with her or not. And in light of the fact as well that she was not told what to say but just to cooperate

here, doesn't to this court say that it's been inferred that she has to say what they want her to say or she won't get her child back.

And besides that, again, there's nothing other than these federal cases that this court believes aren't really distinguishable that would lead this court to believe that a due process issue has even really been raised for that analysis.

Given the fact that the witness is just that, a witness, not a co-defendant, not a defendant, her statements are certainly subject to cross-examination at a trial and any inconsistent statements that may have been there. And certainly, that's something for which the jury can make their determination as to the reliability of those statements.

And further, in this case, certainly there was sufficient corroboration from other witnesses to support the reliability of the statements that were made to the officers. And in this case, again, the Court can't find that there has been any error here at all in that there was sufficient corroboration at well.

As to the opinion testimony from Mr. Schrafnagel and the officer, the only thing that this court thinks comes close to being opinion testimony as to truthfulness is certainly that last part by Mr. Schrafnagel. The quote was

in general she seemed relatively relaxed and pretty honest. Is that a definitive opinion statement that she was telling the truth? I don't think so.

In general she seemed relatively relaxed and pretty honest. It's not saying she told the truth. Certainly, I think any reference to honesty it's best to just stay away from that. But at the same token, it's not as though he came out and gave specific testimony that it was his opinion that she was honest. Again, generally pretty honest.

The Court doesn't believe it gets to that level of the opinion testimony for which this should be suppressed or ruled inadmissible. And in addition, the Court would find if there was any error here, it surely would have been harmless. Because, again, there was sufficient corroboration from a number of other witnesses as to the relationship between Mr. Samuel and Ms. Leyh before they left the state.

As to the ruling on the exclusion of the evidence of the reported molestation of Ms. Leyh's sister, the Court would find that any type of probativeness would be so remote or slight-- and balancing that against the prejudicial effect and confusion of the issues-- and really that is totally extrinsic as well. The Court can see why that was ruled to be inadmissible.

Whether or not there had been this report of a molestation and to somehow make some argument that this would somehow show that Mr. Samuel wouldn't want to somehow throw attention his way by making this type of a report-- that, to this court, is truly remote and again extrinsic and certainly would be prejudicial in terms of-- confusing with regard to trying to cast a shadow over the Leyh family, so to speak.

That really didn't get to the gist of this case which is: Did Mr. Samuel take Ms. Leyh here and was there a violation of 948.31 as well as with regard to the sexual assault? The Court just does not find that to be probative. I would say none at all. If anything, very slight, very slight.

And again, if there was any error, it would certainly be harmless given the cumulative nature of all of the evidence that was amassed against Mr. Samuel as well as all the other statements that had been taken from the other witnesses as to the relationship of these two before they left the state.

And certainly, as to the sexual assault, given the fact that, again, they had this relationship that had been observed by others from which the jury could certainly use their judgment in terms of finding sufficient evidence for a finding of guilt here.

First of all, as to the sentencing issue, that's a fairly unique issue. Certainly, it would be a lot simpler if Judge Williams were here because he could say what he was thinking as to what type of significance he placed on that report.

But nevertheless, in the Court's review of the transcript, I think everything that he referred to were all things that were very evident whether he saw that report or not. Just for the record the Court hasn't reviewed it and I know that Judge Williams had indicated to both counsel if they wanted to look at it, they can. He did that at sentencing.

But given the nature of the request here from the defense, I just thought the best thing to do would be to not read it at all at this point. Everything that Judge Williams described in his reasoning were all things that were very evident with regard to Ms. Leyh's attitude and how this offense effected her.

As to the ineffective assistance-- again, I haven't found that there was any real deficient performance because I haven't really found any errors here and any ones that would have been, would have been harmless.

Mr. Musolf's representation certainly was within the objective standards for reasonableness and the Court can't find that there is any deficient performance that

would prejudice Mr. Samuel's defense.

As to the interests of justice, the Court cannot find any apparent miscarriage of justice and there is no substantial probability that a new trial would produce any different result.

Again, this was a case that but for Ms. Leyh's testimony later where she said that they didn't have this relationship until later, all of the other testimony from the other witnesses-- and given what ultimately happened here with them leaving the state and she becoming pregnant, all certainly corroborates what these other witnesses said. That this relationship had started before they ever left the state.

So the Court can't find any miscarriage of justice and the interests of justice here have been served and that there hasn't been any plain error for which a new trial should be ordered either. So the Court will deny the Defendant's motions at this time.

Anything else, Mr. Jorgensen? You'll prepare the order on it-- or Mr. Henak?

MR. HENAK: A couple of things. First, maybe I misunderstood the Court during the discussion of the the sentencing issue. I thought that the Court said something about Judge Williams saying that counsel could read the transcript afterwards. I didn't see anything in

the transcript and--

THE COURT: I swear I read that.

MR. HENAK: I think he said that it would be available.

MR. JORGENSEN: He said it would be made part of the record and be available to the Court of Appeals.

THE COURT: Oh, I was thinking it was for you to review.

MR. JORGENSEN: No.

MR. HENAK: No.

THE COURT: I'm sorry. I read it and I must have misunderstood it when I was reading it.

MR. JORGENSEN: I guess that was my understanding, too.

Do you have the transcript here?

MR. HENAK: Yes, I do.

THE COURT: Don't ask me to find it. I read it once. Don't ask me to find it right now.

MR. HENAK: Actually, if we could just leave it at what the Court said since obviously none of us were in the Court's mind.

THE COURT: And that's fine. If the Court of Appeals looks at it and decides I should do the resentencing hearing, I guess I'll look at it at that time.

MR. HENAK: Fine. The second point is I

STATE OF WISCONSIN | CIRCUIT COURT BRANCH 3 | WINNEBAGO COUNTY

State of Wisconsin,
Plaintiff,

vs.

Case # 97CF109
DECISION ON MOTIONS

Stanley A.Samuel,
Defendant.

Defendant has moved to **suppress statements** of Tisha Leyh which he alleges were obtained through threats and coercion. An evidentiary hearing was held as to the circumstances of the making of the statements, which were recanted by Tisha at the preliminary examination.

In support of his argument, he cites cases dealing with a confessions or statements of a defendant, on the basis that the defendant has a right against self-incrimination which must be voluntarily waived, and coercion renders the statement involuntary. The purpose of suppression is to deter police misconduct.

Defendant argues that the rules that apply to coercion of a defendant must also apply to witnesses or alleged victims. The privilege against self-incrimination is personal to the defendant, and is unrelated to witnesses or alleged victims.

A trial is a search for truth, and the jury is the sole judge of the credibility of the witnesses and the weight to be given to their testimony. Exceptions are made where a threshold finding is made by the court, since presentation to the jury would expose them to evidence which might be otherwise barred by constitutional protections. See discussion in State ex re. Goodchild v. Burke, 27 Wis. 2d 244, 262-266 (1965).

Tisha has clearly indicated her desire to continue a close relationship with the defendant, and may properly be expected to be a witness hostile to the prosecution. The jury must determine her credibility and the weight to be given to her testimony, and should have all the information, including the alleged coercive conduct, needed to make those determinations.

Where there is no showing that Tisha's constitutional rights were violated, to have the court make the decision as to whether she was coerced and what effect that has had on her testimony would usurp the jury's function.

I conclude that, if otherwise admissible, Tisha's statements cannot be excluded soley on the ground that they were coerced, and deny defendant's motion to suppress them.

Defendant has also moved to suppress evidence seized as a result of the stop of his car at a drug enforcement checkpoint in Missouri. He argues that the checkpoint did not stop every vehicle or employ a non-discretionary criteria for which were stopped.

It is clear that police stopping a vehicle is a seizure under the 4th and 14th Amendments. The U.S. Supreme court has authorized as reasonable such stops on public highways without probable cause or individualized suspicion.

In Michigan State Police v. Sitz, 110 L Ed 2d 412 (1990), the Court addressed the stop of every motorist passing through a checkpoint and associated preliminary questioning and observation. It approved the Michigan checkpoints, which were established pursuant to guidelines and where uniformed officers stop every vehicle. It distinguished random stops as showing standardless and unconstrained discretion which the court prohibits.

The Sitz decision was explained in U.S. v. Trevino, 60 F.3d 333, 337 (7th Cir. 1995):

> "Thus, what was dispositive in Sitz was that pursuant to neutral guidelines uniformed officers conducting the checkpoint stopped every incoming vehicle, and were not at liberty to randomly decide which motorists would be stopped and which would not."

In the Missouri checkpoint, there was some self-selection by drivers, who were told by signs along the major highway that there was a checkpoint ahead. Those who sought to avoid it could exit on a road-to-nowhere, and, after leaving the highway, were notified by a sign on the exit ramp that the sheriff's checkpoint was just ahead.

The checkpoint was set up pursuant to written guidelines. All vehicles were stopped and at least a visual contact was made. Defendant argues that, because known local drivers were allowed to leave without questioning, the police were using prohibited discretion.

It is the stop which constitutes the seizure, and that, on the testimony, was uniformly applied. The police did a license check and asked their destination and reason for exiting of those they did not recognize. Since local people or others who used the exit regularly had presumably answered those questions

before, this court concludes that omitting the questions was not an impermissible exercise of discretion.

The checkpoint appears to meet the balancing test set forth by the majority in Sitz and the interpretation of Sitz set forth in Travino. The Supreme Court of Missouri in State v. Damask, 936 S.W.2d (Mo.banc 1996) has specifically approved the procedures used.

I conclude that that the seizure of defendant's vehicle was not unreasonable.

The license check showed that there was an active warrant on defendant, and I conclude that his further detention and arrest was proper.

The uncontradicted testimony indicates that defendant gave consent to the search of his vehicle after his arrest, and the check imprinter, blank com-checks and typewriter were found.

I will accordingly deny the motion to suppress the evidence seized.

The State seeks, by motion in limine, permission to introduce other acts evidence regarding:

1) the passing of forged Com-checks;
2) defendant falsely registered his vehicle in the name of Tisha' father;
3) defendant has sexual intercourse with Tisha numerous times in this county, which continued during the majority of the period prior to their return; and
4) that defendant has sexual contact with Tisha between September 1995 and leaving the county in January 1996, sometimes twice a week.

In ruling on the admissibility of other acts evidence, that evidence must be relevant to the issues before the court. State v. Bedker, 149 Wis. 2d 257, 263 (CA 1989). Ordinarily, the purpose of offering the evidence must fall within the exceptions listed in sec. 904.04(2), but that list is not exclusive. State v. Johnson, 181 Wis. 2d 470, 492 (CA 1993). The evidence may be admissible for other purposes relevant to elements of the charges which are in dispute.

Even if the evidence is relevant and the purpose for which it is offered is permitted, it must be excluded if the probative value is substantially outweighed by the danger of unfair prejudice.

The court cannot, on this record, determine with certainty what elements will be disputed, and proceeds on the basis that

the plea puts the State to its proof on all issues. Moreover, the use of evidence to rebut matters raised by the defense must be
deferred until the issue arises.

As to the allegedly forged **checks**, the State argues that the evidence would show that defendant planned never to stay in one place for fear of being caught by the police. However, as defendant points out, the state has not shown that such plan was made prior to leaving in January, 1996.

I conclude that the State, on this record, has neither shown that the evidence is relevant to any of the three charges nor that it falls within any exception to the "character rule" prohibition.

I will accordingly deny admissibility in the State's case in chief.

As to the alleged **false registration**, the state argues that it shows defendant's intent to disguise the ownership of the vehicle and argues that this is relevant to lack of consent, an element in Count #1.

I conclude that it is relevant to lack of consent because of the implication raised by the attempt to conceal the ownership and make it appear that it was owned by the child's father.

I further conclude that it is not unfairly prejudicial. There is nothing about that registration which would tend to inflame or improperly influence the jury.

The court will allow testimony as to the registration.

As to allegations of **sexual intercourse**, both in Winnebago County and after defendant and Tisha left the county, it appears that such evidence is relevant to Count #2, taking for an unlawful purpose.

It is also relevant, in light of Tisha's recantation of her prior statements, to her possible bias and credibility.

Defendant argues that the evidence is remote in time, which limits its relevance. Where the acts are part of an on-going course of conduct, as alleged here, I conclude that relevance is strengthened rather than reduced.

The evidence has substantial probative value. It is clearly prejudicial to the defendant, but not unfairly so. Unfairness arises where the evidence tends to influence the outcome by improper means, appeals to the jury's sympathies, arouses its sense of horror, promotes its desire to punish, or otherwise

causes the jury to base its decision on extraneous considerations. Evidence of sexual misconduct will be offered in relation to Count #3. I conclude that evidence of other sexual acts is less likely to inflame the jury than it would be if they were the only evidence presented.

The same rationale applies the evidence of **sexual contact**, sometimes twice a week, beginning in September, 1995.

To the extent that such evidence may create a unanimity problem as to Count #3, the court will, on request, consider a limiting instruction.

I will allow testimony as to those items, to the extent otherwise admissible.

Defendant has moved for **change of place of trial.**

Sec. 971.22(3) requires the court to determine whether there is such prejudice in this county that a fair trial cannot be had.

On review of the supporting documentation furnished, it is obvious that there has been substantial and wide spread publicity over an 18 month period. That alone, however, is not sufficient to establish that a fair trial cannot be held. The factors which the court should consider, prior to voir dire, are:

the inflammatory nature of the publicity;
the degree to which the publicity permeated the area from which the jury would be drawn;
the timing and specificity of the publicity;
the participation of the state in the publicity; and
the severity of the offense charged.

State v. Messelt, 178 Wis. 2d 320, 327 (CA 1993).

In Messelt, the court considered articles including "graphic detail" taken from the complaint and the preliminary examination. It found that the publicity was not inflammatory, since it was accurate and did not show an intent to inflame or arouse community feeling against the defendant.

Missing Child posters and flyers were distributed in an attempt to find Tisha. The examples provided to the court include the words "non-family abduction" and identify defendant as the abductor. The name of the contact agency was "The National Center for Missing and Exploited Children".

As to "non-family" abduction, it was accurate, and probably was felt to add some urgency which might not be attached to the taking of a child by a parent. It is not inflammatory, and the intent was to locate the child, not to inflame.

The naming of defendant, and his picture, were designed to help locate the child. They are no more inflammatory than the issuance of the criminal complaint.

Defendant argues that the name of the contact agency, which includes the word "Exploited" suggests that defendant was exploiting Tisha. I conclude that the name is unlikely to be considered an accusation, or even to be remembered by most readers.

Television covered the story of the missing girl, including on appearance by Tisha's mother pleading for her return. The transcript is not available, but it would appear that, while raising emotions, the plea was for the purpose of obtaining information about Tisha's whereabouts or to persuade her to return or defendant to return her.

Follow-up TV and newspaper stories involved reports that friends said that Tisha had willingly run away or that Tisha had "apparently run away" with the defendant. The defendant argues that the word "apparently" casts doubt on Tisha's willingness and prejudices the defendant, an argument too subtle to be accepted. The indications that the child had willingly run away show a balanced presentation, and tend to favor the defendant.

Other stories included mention and details about defendant's prior record, that there were outstanding warrants against him, a "trail of bad checks" which the search was following, and, after his arrest, that his parole had been revoked.

While such information may be prejudicial, it was accurate and not intended to arouse.

The publicity began about the time of the leaving, and continued through September 30, 1997. Since the stories were not inflammatory, it is likely that the effect would dissipate over the intervening months.

Defendant argues that the state had released the information. The early information was clearly aimed at the location of the girl, and the later was almost entirely taken from the complaint, hearings, motions and statements made by defendant in conjunction with his motion to be returned to prison and the fight in the jail.

The publicity repeatedly indicated that defendant faces up to 54 years in prison, and that there was consideration whether to proceed on state or federal charges. The crimes, with the repeater allegations, are obviously serious, but the amount of publicity was in large part due to the length of time the child was gone.

I conclude that the defendant has not shown that a fair trial cannot be had in Winnebago County on the present record. If unforeseen difficulties arise when voir dire is conducted, the matter will be reconsidered.

The jury will be selected as scheduled on December 1, 1997.

Dated this 14th day of November, 1997

By the Court,

Thomas S. Williams

cc: ADA Jorgensen
Atty Musolf